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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-991

CHARLES V. COSTANZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION AND ORDER BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-3) and the order of the district court denying the motion to suppress (Pet. App. A-4 to A-8) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1974. On January 6, 1975, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari until February 8, 1975, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's right to confrontation was violated by the court's refusal to allow either the government or petitioner to question an informant the court called at a pretrial hearing to determine whether any illegal wire interception had been made in the case, where petitioner was allowed to cross-examine the informant fully at trial.

2. Whether probable cause to arrest petitioner existed when a reliable informant notified federal authorities that petitioner was bringing a large quantity of cocaine from Nashville to New York, and this information was corroborated by federal agents who observed petitioner catching a plane from Nashville to New York.

3. Whether federal agents could properly search a suitcase in petitioner's possession incident to his arrest.

4. Whether the district judge exceeded his authority in questioning a witness and commenting on the evidence.

5. Whether the government could properly seek to show bias on the part of petitioner's character witnesses by asking if they were under indictment with petitioner on charges of conspiring to import cocaine.

6. Whether the trial court erred in failing to give special instructions to the jury on the reliability of witnesses.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of possessing cocaine with intent to dis-

tribute it, in violation of 21 U.S.C. 841(a)(1). He was conditionally sentenced—pending final sentencing pursuant to 18 U.S.C. 4208(b)—to a term of 15 years' imprisonment, to be followed by a special parole term of three years. The court of appeals affirmed *per curiam* (Pet.. App. A–1 to A–3).

The evidence adduced at trial and at two suppression hearings revealed that in July 1973 an informant who had previously given federal authorities accurate and reliable information notified the New York office of the Drug Enforcement Administration (DEA) that he had been negotiating with petitioner to buy a kilogram of cocaine and that he expected petitioner to leave Nashville, Tennessee, for New York on the 24th of July with the cocaine (H. 12–14, 18–20; Winokour T. 33–43, 64–69).[1] The Nashville DEA office was notified, and it was determined that petitioner had in fact made reservations to fly to New York on the 24th (H. 14–16, 33–34). Petitioner cancelled his reservation for that date, however, and made one for the 25th (H. 16–17).[2]

On July 25, petitioner arrived at the airport, where he was arrested as he stood in line at the check-in counter (H. 38–39; T. 27–30, 79). His suitcase, which was on the floor beside him, was seized; it was found to contain three and a half pounds of cocaine in 10

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[1] "H." refers to the transcript of the suppression hearing of November 16, 1973; "2H." refers to the transcript of the suppression hearing of February 8, 1974; "T." refers to the transcript of the trial; "Winokour T." refers to the separate transcript of the testimony of Bruce Winokour.

[2] The informant called petitioner after he failed to take the flight and was informed that petitioner had cancelled the flight because of personal problems (H. 16–17; T. 151–152).

plastic bags, as well as a balance scale and a box of empty bags (T. 34–35, 38–39, 79–81, 91–96). In addition, two small vials of cocaine were discovered, one in petitioner's coat pocket and one in a small handbag he was carrying when arrested (T. 42–43).

Petitioner testified at trial and acknowledged possessing the cocaine (T. 149–150), but he claimed that he had agreed to the sale only after repeated requests by the informant (T. 146–148). In addition, he denied having ever previously sold any cocaine and explained that he had only succumbed this time because he was in financial straits (T. 148–149, 165).

ARGUMENT

1. Following the initial suppression hearing, the trial court ordered a second one, limited to the issue whether wire interceptions furnished any of the information upon which the agents relied in establishing probable cause for petitioner's arrest (2H. 3–5). After the government rested, the court indicated it was going to call the informant "to ask him three questions" and that "there will be no additional examination of him by either side" (2H. 156). Both defense counsel and the Assistant United States Attorney objected, indicating that they would like to question the witness if the court were going to call him (2H. 156–157). The court denied their requests, called the informant, and asked him several questions relating to whether he received any information concerning petitioner from DEA agents (2H. 157, 159–160).

Petitioner's claim (Pet. 11) that this procedure violated his right to confrontation is incorrect. It is established that the right to confrontation is not absolute at a suppression hearing, *McCary* v. *Illinois*, 386 U.S. 300,[2] and that the rules of evidence generally are more relaxed at a suppression hearing than at trial, since the former does not involve guilt or innocence but the admissibility of probative evidence.

As the court below correctly stated (Pet. App. A–2 to A–3):

> While the right of cross-examination of witnesses is scrupulously protected by the courts, it is subject to limitations within the sound discretion of the trial judge. In the present case, the trial judge made the informant his own witness in order to make inquiry only with respect to whether or not wiretaps furnished any of the probable cause information upon which the agents relied in arresting the defendant. The question raised by the motion to suppress the evidence had been inquired into at a prior hearing; and at the trial of the case itself on its merits, the appellant's attorney

[2] Petitioner's reliance (Pet. 12–13) on *United States* v. *White*, 446 F. 2d 1280, 1282 (C.A. 3), and *United States* v. *Thacker*, 382 F. 2d 732 (C.A. 6), is misplaced. In *White* the court held that neither Rule 12 nor 41 of the Fed. R. Crim. P. *precludes* cross-examination at a pretrial hearing. Similarly, in *Thacker* the court merely pointed out that where a defendant is given an opportunity to cross-examine a witness at a suppression hearing but fails to explore the informant's reliability, he cannot later question the basis for the witness' reliance on the informant's tip. Neither proposition is inconsistent with the district court's procedure here.

> was given free rein to cross-examine the informant even though he had made him his own witness. We think that the district judge acted reasonably and within the permissible bounds of his discretion in thus limiting the right of cross-examination at one of the suppression hearings.

2. Petitioner also contends (Pet. 19) that there was no probable cause to justify his warrantless arrest. This claim is answered fully by this Court's decision in *Jones* v. *United States,* 362 U.S. 257, 269–270, where the Court stated:

> In testing the sufficiency of probable cause for an officer's action even without a warrant, we have held that he may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge. *Draper* v. *United States,* 358 U.S. 307. We there upheld an arrest without a warrant solely upon an informant's statement that the defendant was peddling narcotics, as corroborated by the fact that the informant's description of the defendant's appearance, and of where he would be on a given morning (matters in themselves totally innocuous) agreed with the officer's observations.

In the instant case a reliable informant advised the DEA that petitioner had agreed to sell a large quantity of cocaine and would be leaving Nashville with the drugs on July 24. This information was corrobo-

rated by the arresting officers when they discovered that petitioner had made reservations on a flight to New York for that day. Probable cause clearly existed to believe petitioner was in possession of narcotics. See *Draper* v. *United States*, 358 U.S. 307.[4]

3. Petitioner further argues (Pet. 14–19) that, in any event, the DEA agents could not properly have searched his suitcase without a search warrant. This claim is insubstantial.

Initially we note that petitioner's claim (Pet. 16–18) that his suitcase was seized after it had been surrendered to an airline employee is inaccurate. He cites no transcript references to support that proposition, and the only testimony we have been able to find that dealt with the location of the suitcase did not indicate that it had been turned over to an airline employee. To the contrary, Agent Yarn testified that the suitcase was on the floor beside petitioner, who was standing at the check-in counter. The agent testified that he and Agent Click approached petitioner at the check-in counter and informed him he was under arrest. At that time, "Agent Click retrieved Costanza's bag off the ground there, picked it up and carried it" (H. 39).

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[4] The fact that the arresting agents did not have personal knowledge of the informant's reliability is irrelevant. They were informed by their New York counterparts that the information being supplied was reliable (H. 33), and the New York agents testified that the informant had always supplied accurate information in the past (H. 18–20). It is well established that in such a situation probable cause can rest upon the collective knowledge of all the agents. See, *e.g.*, *United States* v. *Pitt*, 382 F. 2d 322, 324 (C.A. 4); *Stassi* v. *United States*, 410 F. 2d 946, 952 (C.A. 5).

Having made a lawful custodial arrest, the agents could search petitioner's person, *United States* v. *Robinson*, 414 U.S. 218, 235, and the area within his immediate control, *Chimel* v. *California*, 395 U.S. 752. A search of an accused's person and the area within his control includes a suitcase in his possession. *E.g.*, *United States* v. *Buckhanon*, 505 F. 2d 1079 (C.A. 8); *United States* v. *Kaye*, 492 F. 2d 744 (C.A. 6); *United States* v. *Mehciz*, 437 F. 2d 145 (C.A. 9); *United States ex rel Muhammad* v. *Mancusi*, 432 F. 2d 1046 (C.A. 2), certiorari denied, 402 U.S. 911.[5]

4. Petitioner claims (Pet. 23, 30) that the trial court interrupted the proceedings with numerous comments and questions and thereby violated his right to a fair trial.

It is, however, well settled that a trial judge may ask questions and make comments upon the evidence so long as the comments and questions are fair and not misleading. *E.g.*, *Quercia* v. *United States*, 289 U.S. 466; *United States* v. *Wade*, 364 F. 2d 931, 935 (C.A. 6). In the instant case, as the court below concluded (Pet. App. A–3), the record reveals that

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[5] The cases upon which petitioner relies are inapposite. For instance, in *United States* v. *Jones*, 475 F. 2d 723, 728 (C.A. 5), the court indicated in dictum that if an accused had been arrested and had his hands cuffed behind his back, the police could not then search a suitcase several feet away, since it would not be within his immediate control. The court also stated, however, that if his hands were cuffed in front, the search of a suitcase could be justified under *Chimel*, *supra*, even if there were numerous police present. Since there would have been less justification for a search in the latter situation than there was in the instant case, the Fifth Circuit's decision is not in conflict with the decision below.

the court's questions and comments were appropriate and did not constitute an abuse of discretion (*e.g.*, T. 90, 270–271, 360).[6]

5. Petitioner also contends (Pet. 41), incorrectly, we submit, that the court erred in allowing the government to ask two of petitioner's character witnesses whether an indictment was pending against them and petitioner charging a conspiracy to import cocaine (T. 411, 643).

Although a witness' general veracity cannot be impeached by showing that he has been indicted, it is permissible to inquire in this area if it would demonstrate a basis for bias or prejudice. See, *e.g.*, *United States* v. *Baker*, 494 F. 2d 1262, 1266–1267 (C.A. 6), and cases there cited. See also McCormick, *Evidence* § 40 (Cleary ed. 1972). In the instant case, the fact that petitioner's witnesses were co-indictees with him

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[6] We illustrate this by reference to the alleged improper statement to which petitioner devotes the most space in his petition (pp. 26–27). Petitioner called a character witness, who testified that petitioner's reputation for truth and veracity in the clothing business was good (T. 180–181). When the government indicated it did not intend to cross-examine the witness, the court asked (T. 181): "The COURT: Mr. Schwartz, is it part of his reputation as known by you that he has for a number of years been buying cocaine at $700 a half ounce and $1,000 an ounce four to six times a year and use it personally?"

Petitioner claims that this question assumed a fact not then proven and was improper in form. But petitioner had testified to each of these facts prior to Mr. Schwartz's character testimony (T. 141–144, 174). Moreover, the form of the question is correct. The "[h]ave you heard" form advocated by petitioner (Pet. 27) is not different in substance from "is it part of his reputation as known by you" which the court used (T. 181).

on charges of conspiracy to import cocaine is clearly a factor that could tend to bias those witnesses in petitioner's favor. The court did not abuse its discretion in allowing this information before the jury. It clearly and unequivocally instructed them that an indictment is not evidence of guilt and may not be considered in arriving at petitioner's guilt or innocence, but may be considered only on the question of the possibility of bias on the part of those two witnesses (T. 410–411, 643, 713, 716–717).[7]

6. Finally, petitioner raises a number of claims involving the court's instructions to the jury (Pet. 31–40). He claims that the court should have given a variety of specific instructions concerning, among other things, the potential bias of informers, impeachment by past convictions, and the role of an informant

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[7] The court instructed the jury (T. 716–717):

"Now, you have heard the witness Nancy Gail Jenkins and also the witness Charles Kramer testify that each of them have been indicted as co-conspirators with this defendant in other cases. I caution you that this evidence cannot be considered as evidence either of the guilt of Nancy Gail Jenkins, Charles Kramer or the defendant in either of those cases. Neither is it any evidence of the guilt of the defendant Costanza in this case.

"In other words, it cannot be considered and is not competent as evidence of the truth of the facts alleged in any of the cases. The evidence also cannot be considered as evidence tending to impeach the overall credibility of the witnesses or the defendant's credibility as a witness. I instruct you that you are not to so consider it.

"I do instruct you, however, that you may consider this evidence if at all for the limited purpose of determining the motives or bias, if any, of these two particular people as witnesses in this case."

as agent of the government for purposes of entrapment. We submit that when read as a whole (see *Hamling* v. *United States*, 418 U.S. 87, 107–108) the instructions were a clear, adequate, and impartial statement of the law (T. 711–720).

The court chose not to give specific instructions dealing with each aspect of the credibility of witnesses, but rather gave several general ones that covered the same area. Thus, the court did not inform the jury, as it might have, that the defendant's testimony must be looked at with caution because of his interest in the outcome[8] or that an informant's testimony must be viewed with special caution. Instead, the court instructed the jury (T. 716):

> In considering what weight you should give to the testimony of the several witnesses, you should take into consideration their interest in the result of the trial if any such interest be shown, their conduct and demeanor while testifying, their fairness or bias if any such appear, their opportunity for seeing and knowing and for remembering the things about which they testified, the reasonableness or unreasonableness of the testimony given by them and all of the evidence and facts and circumstances proved tending to corroborate or contradict the witness if any such appear.

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[8] To the contrary, the court informed the jury that petitioner's testimony "should be judged * * * by the same standard you apply to all of the witnesses" (T. 716).

In addition, the court instructed the jury that "if you think any witness in this case has willfully testified falsely then you are at liberty to disregard all" or part of that witness' testimony (T. 718). It also made it clear that the jury could consider previous convictions "if you think it is relevant and material in considering the credibility of the witnesses" (T. 719). These admonitions were sufficient.

As petitioner notes, the court did not explicitly inform the jury that an informant was a government agent. However, after clearly explaining the law of entrapment (T. 714–716), the court gave an example in which an informer was a government agent (T. 715). In view of this instruction and petitioner's final argument (T. 704), which stressed that the informant was a government agent, it is apparent that the jury understood that fact.[9]

In sum, while the language of the court's charge was not as explicit as petitioner might have wished, it generally covered the appropriate areas and was certainly sufficient in a case such as this, where the issues were relatively straightforward and the evidence of guilt overwhelming.

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[9] Petitioner's claim that the court should not have told the jury that they could consider the pending indictments of defense witnesses only as a potential source of bias is insubstantial. As previously noted, the charge was a correct statement of the law and, once the court had determined to allow cross-examination as to the indictment, petitioner himself requested the charge (T. 410).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975